NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK
JUL 19 2013
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,
v.
MIRIAM MENDIOLA MARTINEZ,
Petitioner.

2 CA-CR 2013-0177-PR
DEPARTMENT B

MEMORANDUM DECISION
Not for Publication
Rule 111, Rules of
the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF MARICOPA COUNTY

Cause No. CR2009168045001DT

Honorable James R. Morrow, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

William G. Montgomery, Maricopa County Attorney
By Andrea L. Kever — Phoenix
Attorneys for Respondent

Joy Bertrand Esq., LLC
By Joy Bertrand and Shannon Peters — Scottsdale
Attorneys for Petitioner

K E L L Y, Presiding Judge.

¶1 Miriam Martinez petitions this court for review of the trial court's order dismissing her untimely notice of and petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that ruling unless the court clearly has

abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Martinez has not sustained her burden of establishing such abuse here.

¶2 In 2009, Martinez pled guilty to solicitation to commit forgery. The trial court suspended the imposition of sentence and placed Martinez on a two-year term of probation. In 2011, Martinez filed a notice of and petition for post-conviction relief, arguing that her failure to timely seek post-conviction relief was without fault on her part, *see* Ariz. R. Crim. P. 32.1(f); her plea was involuntary because the plea colloquy was insufficient; her counsel had rendered ineffective assistance pursuant to *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473 (2010), for failing to advise her of the immigration consequences of her plea; and *Padilla* applied retroactively to her case.

¶3 Although the trial court initially dismissed Martinez's notice, it granted her motion for rehearing and scheduled an evidentiary hearing on her claims. It also permitted the state, which previously had not responded to her petition, to file a response. In that response, the state argued, inter alia, that an evidentiary hearing was unnecessary in light of this court's decision in *State v. Poblete*, 227 Ariz. 537, 260 P.3d 1102 (App. 2011), determining *Padilla* was not retroactively applicable to defendants, like Martinez, whose conviction was final when *Padilla* was decided. In her reply to that response, Martinez additionally claimed she was entitled to relief pursuant to Rule 32.1(g) because *Padilla* constituted a significant change in the law, and further suggested *Poblete* had incorrectly determined that *Padilla* did not apply retroactively.

¶4 The trial court summarily denied relief, vacating the scheduled evidentiary hearing. Relying on *Poblete*, the court determined Martinez was not entitled to relief

pursuant to Rule 32.1(g). It additionally rejected her claim under Rule 32.1(f),[1] concluding she had admitted she had been provided with information at her sentencing "concerning her post-conviction relief rights."

¶5 On review, Martinez first asserts the trial court erred because it permitted the state to file an untimely response to her petition for post-conviction relief. Rule 32.6(a) requires the state to file its response within forty-five days after the filing of the petition, and permits the court to grant a thirty-day extension "[o]n a showing of good cause," with additional extensions permitted "only upon a showing of extraordinary circumstances." The state, however, did not request permission to file an untimely response until more than six months after Martinez's petition had been filed, and did not file a response to her motion for rehearing, as the trial court had ordered. Based on the record before us, it does not appear the court found good cause or extraordinary circumstances justifying the state's untimely filing.

¶6 Martinez asserts that "[g]ranting review and relief" on this basis would "ensure[] that the State knows [it] cannot ignore the Court's order . . . and still benefit from such ignorance." But even if we agreed the trial court abused its discretion by permitting the state to file a response under these circumstances, Martinez does not identify, nor does the record reflect, any resulting prejudice. As we explain below, Martinez's claim on review fails as a matter of law. Thus, any error in permitting the state to respond clearly was harmless. *Cf. State v. Pena*, 209 Ariz. 503, ¶ 15, 104 P.3d 873, 877 (App. 2005) ("Error is harmless only if . . . , absent the error, the court would have reached the same result.").

---

[1]In doing so, the trial court appears to have implicitly rejected as untimely Martinez's claim regarding deficiencies in the plea colloquy. Martinez does not suggest on review that the court erred in rejecting her Rule 32.1(f) claim.

¶7 Martinez next argues her petition "should not have been dismissed as untimely" because she brought a claim pursuant to Rule 32.1(g), thereby "excusing [her] delayed filing." Martinez misapprehends the trial court's ruling. Although it concluded correctly that her notice had been untimely filed, it denied her claim for relief under Rule 32.1(g) because it lacked merit, not because her notice was untimely filed.

¶8 Finally, relevant to her claim pursuant to Rule 32.1(g), Martinez argues that *Padilla* is retroactively applicable to her case. Rule 32.1(g) permits post-conviction relief based on a "significant change in the law that if determined to apply to defendant's case would probably overturn the defendant's conviction or sentence." And a claim pursuant to that rule may be raised in an untimely post-conviction proceeding. Ariz. R. Crim. P. 32.2(b). The Supreme Court determined in *Padilla* that counsel's failure to advise a client about the immigration consequences of a guilty plea constitutes deficient performance under *Strickland v. Washington*, 466 U.S. 668 (1984). 559 U.S. at ___, 130 S. Ct at 1483.

¶9 In *Poblete*, this court found that *Padilla* constituted a significant change in the law pursuant to Rule 32.1(g). 227 Ariz. 537, ¶ 10, 260 P.3d at 1105. We additionally concluded, however, that *Padilla* did not apply retroactively to defendants whose convictions were final before *Padilla* was decided on March 31, 2010. 227 Ariz. 437, ¶¶ 12, 16, 260 P.3d at 1105-07. We reasoned that, although the Court in *Padilla* applied the longstanding principles of *Strickland*, it established a new rule not subject to retroactive application because it, for the first time, applied those principles to the collateral consequences of a guilty plea—namely, immigration consequences. *Poblete*, 227 Ariz. 537, ¶¶ 13-15, 260 P.3d at 1106.

¶10 Martinez's conviction was final when *Padilla* was decided. She was sentenced on December 24, 2009, and her time to file a notice of post-conviction relief expired on March 24, 2010—seven days before the Supreme Court decided *Padilla*.[2] *See* Ariz. R. Crim. P. 32.4 (notice of post-conviction relief must be filed "within ninety days after the entry of judgment and sentence"); *State v. Towery*, 204 Ariz. 386, ¶ 8, 64 P.3d 828, 831–32 (2003) ("A defendant's case becomes final when 'a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied.'"), *quoting Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987). Thus, under *Poblete*, *Padilla* does not apply to Martinez's case. But she argues on review that our decision in *Poblete* is incorrect and that, in light of the Supreme Court decisions *Lafler v. Cooper*, ___ U.S. ___, 132 S. Ct. 1376 (2012), and *Missouri v. Frye*, ___ U.S. ___, 132 S. Ct. 1399 (2012), we must conclude *Padilla* is retroactively applicable.

¶11 In February 2013, however, after Martinez submitted her petition for review, the Supreme Court concluded *Padilla* does not apply retroactively to cases that were final before it was decided. *Chaidez v. United States*, ___ U.S. ___, 133 S. Ct. 1103, 1105 (2013). The Court concluded that its decision in *Padilla* "answered a question about the Sixth Amendment's reach that [the Court] had left open, in a way that altered the law of most jurisdictions," thereby "breaching the previously chink-free wall between direct and collateral consequences." *Id.* at ___, 133 S. Ct. at 1110. Reasoning that "*Padilla*'s holding that the failure to advise about a non-criminal consequence [like

---

[2]To the extent this court's recent decision in *State v. Whitman*, ___ Ariz. ___, 301 P.3d 226 (App. 2013), requires us to calculate whether Martinez's conviction was final from the filing date of the sentencing minute entry rather than from the date of her sentencing, we observe that Martinez's conviction still would have been final before *Padilla* was decided.

deportation] could violate the Sixth Amendment would not have been—in fact, was not—'apparent to all reasonable jurists'" before *Padilla*, the Court concluded *Padilla* announced a new rule of law. *Id.* at ___, 133 S. Ct at 1111, *quoting Lambrix v. Singletary*, 520 U.S. 518, 528 (1997). The Court thus held that *Padilla* did not apply retroactively to convictions that were final when it was decided. *Id.* at ___, 133 S. Ct. at 1107, *relying on Teague v. Lane*, 489 U.S. 288 (1989). Because *Padilla* does not apply retroactively to Martinez's final conviction, the trial court did not err in rejecting her claim based on Rule 32.1(g).

¶12 For the reasons stated, although review is granted, relief is denied.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Presiding Judge

CONCURRING:

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge